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No. 04-69

Supreme Court, U.S.
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# In The Supreme Court of the United States

AGNES BERNARDO, PAMELA COLIP and SAUNDRA DUFFY-HAWKINS,

*Petitioners,*

v.

PLANNED PARENTHOOD FEDERATION OF AMERICA, PLANNED PARENTHOOD OF SAN DIEGO AND RIVERSIDE COUNTIES,

*Respondents.*

**On Petition For Writ Of Certiorari To The Court Of Appeal Of California, Fourth Appellate District, Division One**

## RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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## CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rules, Rule 29(6), Respondent Planned Parenthood of San Diego and Riverside Counties is a not-for-profit corporation that does not have a parent corporation and is not owned in any part by a publicly held company. Respondent Planned Parenthood Federation of America is a not-for-profit corporation that does not have a parent corporation and is not owned in any part by a publicly held company.

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## I. FACTUAL AND PROCEDURAL BACKGROUND

Petitioner (Bernardo) brought an action in the Superior Court of California, in the County of San Diego alleging violations of California *Business and Professions Code* (B & P Code) sections 17200 and 17500 (California's unfair competition and false advertising laws) and seeking to restrain Respondents Planned Parenthood Federation of America and Planned Parenthood of San Diego and Riverside Counties (Planned Parenthood) from publishing their opinion that the credible scientific evidence does not establish a link between induced abortion and breast cancer. Bernardo further sought an order requiring Planned Parenthood to communicate Bernardo's view on the issue – that the scientific evidence does establish such a link – to all former and prospective abortion patients.

Planned Parenthood brought a Motion to Strike Strategic Lawsuit Against Public Participation (SLAPP) under California *Code of Civil Procedure* section 425.16 ('anti-SLAPP statute'). This statute provides in pertinent part:

> A cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim. (App. 105a-108a)

The Superior Court granted Planned Parenthood's motion dismissing the Bernardo's Complaint. (App. 84a-104a) The trial court found that the lawsuit arose from Planned Parenthood's exercise of the right to free speech on a public issue (this was not an issue in dispute) and that Bernardo failed to present evidence to establish a probability

of prevailing on the merits. Pursuant to the anti-SLAPP statute, Planned Parenthood was awarded its attorneys' fees and costs.

Bernardo appealed both the order striking her complaint and the order awarding attorneys' fees. The appellate court affirmed the lower court's orders. Pursuant to the anti-SLAPP statute, Planned Parenthood was awarded its fees and costs on appeal. (App. 2a-66a) Bernardo was denied review by the California Supreme Court. (App. 1a)

## II. BERNARDO FAILS TO STATE ANY COMPELLING REASON FOR REVIEW

### A. REVIEW OF THE COURTS' APPLICATION OF EVIDENCE TO CALIFORNIA SUBSTANTIVE LAW DOES NOT IMPLICATE A FEDERAL QUESTION AND IS NOT GROUNDS FOR REVIEW

Bernardo claims that grounds for review exist because application of California *Code of Civil Procedure* section 425.16 to strike her complaint and to award fees and costs to Planned Parenthood violated her right to petition, Due Process, and Equal Protection under the U.S. Constitution and that, as a result, important questions of federal law were raised which must now be decided by this Court.

However, as is readily apparent in reading the Petition, her entire argument hinges on the underlying factual findings by the state courts and their determination that the evidence, viewed most favorable to her, could not sustain her claims under California's substantive law governing unfair competition and false advertising. In fact, she devoted much of her petition for review to setting forth the evidence she contends was improperly interpreted

and improperly applied to her claims by the lower courts. She is in effect arguing that the courts made erroneous factual findings with regard to the evidence she submitted in support of her state law claims and that the courts misapplied section 425.16 to her evidence. However, "a petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." (Supreme Court Rules, Rule 10.) Moreover, the criticisms Bernardo has concerning whether or not the evidence she presented could support her claims involves no question of federal law, rather it involves only whether she stated a claim under California law.

### B. THERE IS NO IMPORTANT QUESTION OF FEDERAL LAW THAT NEEDS TO BE SETTLED BY THIS COURT

California's anti-SLAPP statute is a fee-shifting statute that provides an automatic award of attorneys' fees to a prevailing defendant. The fee award provision does not come into play until it has already been established that (1) plaintiff's complaint arises out of defendant's exercise of First Amendment rights, and (2) plaintiff cannot state and substantiate a legally sufficient claim. (CCP § 425.16(b).)

Bernardo challenges California's anti-SLAPP statute on federal constitutional grounds including the right to petition, the right to Due Process, and the right to Equal Protection. Her "right to petition" claim asserts that by imposing a mandatory award of fees on the losing plaintiff, the anti-SLAPP statute operates to deprive her of her First Amendment right to petition the court. Her "Due Process" and "Equal Protection" claims are grounded in

her assertion that there is "no meaningful standard for liability" under the statute, that there is no subjective intent requirement under the statute, and that the standard is different for successful plaintiffs and successful defendants. The same claims have been summarily denied by the California Supreme Court in *Equilon Enterprises LLC v. Consumer Cause, Inc.*, 29 Cal.4th 53, 52 P.3d 685, 124 Cal.Rptr.2d 507 (2002).

The right to petition is not absolute and provides little or no protection baseless litigation. *Equilon*, at 64. "Section 425.16 does not bar a plaintiff from litigating an action that arises out of the defendant's free speech or petitioning." *Id.* at 63. "It subjects to potential dismissal only those causes of action as to which the plaintiff is unable to show a probability of prevailing on the merits." *Id.* "It provides an efficient means of dispatching, early on in a lawsuit, and discouraging, insofar as fees may be shifted, a plaintiff's meritless claims." (citations omitted) *Id.* This fulfills the legislative intent behind the statute of "encouraging continued participation in matters of public significance" (§ 425.16(a)). (*See generally, Alyeska Pipeline Co. v. Wilderness Society,* 421 U.S. 240, 262, 95 S.Ct. 1612, 1624, 44 L.Ed.2d 141 [explaining that the "circumstances under which attorneys' fees are to be awarded and the range of discretion of the courts in making those awards are matters for Congress to determine"].)

Moreover, there are numerous federal statutes which contain similar fee-shifting provisions. *See, e.g., Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 562, 106 S.Ct. 3088, 92 L.Ed.2d 439 (1986) (noting that more than 100 federal statutes provide for attorneys' fees. As one federal appellate court so aptly posited, "fee-shifting statutes have become common."

*Premier Electrical Construction Co. v. National Electrical Contractors Assoc.*, 814 F.2d 358, 373 (7th Cir. 1987). "They require the loser to pay the winner's fees. Loser-pays-winner statutes discourage litigation with a low chance of success." *Id.* "[T]he proposition that the first amendment, or any other part of the Constitution, prohibits or even has anything to say about fee-shifting statutes in litigation seems too farfetched to require extended analysis. Fee-shifting requires the party that creates the costs to bear them." (citations omitted) *Id.*

Bernardo relies on several cases to support her assertion that a showing of "frivolousness" is necessary in order to effect the attorneys' fees provision of section 425.16 including, *BE& K Construction Co. v. NLRB*, 536 U.S. 516 (2002); *Professional Real Estate Investors, Inc. v. Columbia Pictures Indus., Inc.*, 508 U.S. 49 (1993); *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731 (1983); *Wilson v. Parker, Covert & Chidester*, 28 Cal.4th 811 (2002); *Oren Royal Oaks Venture v. Greenberg, Bernhard, Weiss & Karma, Inc.*, 42 Cal.3d 1157 (1986); and *Pacific Gas and Electric Co. v. Bear Stearns & Co.*, 50 Cal.3d 1118 (1990). Bernardo confuses the issue. Each of the cases she relies on involves the imposition of liability (in the form of asserting a cause of action for damages) against a litigant who was unsuccessful in a prior proceeding. In contrast, the fee-shifting provision of section 425.16 does not make a party "liable" for filing a lawsuit. *Equilon*, *supra*, at 62, citing and distinguishing, *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*, 508 U.S. 49, 113 S.Ct. 1920, 123 L.Ed.2d 611 (1993). As noted by the California Supreme Court in *Equilon*, this Court has held that a defendant may obtain an attorneys' fee award where the plaintiff's suit is objectively "without foundation," noting that a finding of subjective bad faith is not a prerequisite.

*Id.*, citing *Christiansburg Garment Co. v. EEOC,* 434 U.S. 412, 421, 98 S.Ct. 694, 700, 54 L.Ed.2d 648 (1978). Again, fee-shifting statutes simply require the party that creates the costs to bear them. *Premier Electrical Construction Co., supra*, 814 F.2d at 373. None of the cases cited by Bernardo purport to apply the reasoning therein to the context of fee-shifting statutes.

Equally without merit is Bernardo's inappropriate reliance on cases requiring a plaintiff to meet a higher evidentiary burden before imposing tort liability against a defendant for actions involving First Amendment activities, including free speech (*New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964); *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988); *The Florida Star v. B.J.F.*, 491 U.S. 524 (1989)), the right to petition (*McDonald v. Smith*, 472 U.S. 479, 105 S.Ct. 2787, 86 L.Ed.2d 384 (1985)), and freedom of association (*NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982)). Bernardo's flawed analysis ignores the fact that in the case at bar, she brought a claim against Planned Parenthood arising out of Planned Parenthood's First Amendment activity. Section 425.16 was designed to curtail baseless litigation that arises out of a defendant's exercise of First Amendment activities. In enacting section 425.16, the California Legislature sought to prevent the use of meritless litigation as a means to encroach upon or chill a person's exercise of First Amendment rights. This is precisely the evil the above cases sought to address by imposing a higher evidentiary standard on the plaintiff whose claim, like Bernardo's, arises out of defendant's exercise of First Amendment rights.

Finally, Bernardo's Due Process and Equal Protection claims do not raise any novel federal questions. Once it is

determined that an act is in furtherance of protected expression, the burden shifts to the plaintiff to show a "reasonable probability of prevailing" in those claims to survive dismissal. *Metabolife International, Inc. v. Wornick,* 263 F.3d 832, 840 (9th Cir. 2001), citing *Wilcox v. Superior Court,* 27 Cal.App.4th 809, 33 Cal.Rptr.2d 446, 455 (1994). The standard is much like that used to determine a motion for nonsuit or directed verdict, which mandates dismissal when "no reasonable jury" could find for the plaintiff. *Id.* The standard requires a plaintiff to present a sufficient legal basis for the claims and to set forth evidence of sufficient substantiality to support a claim. *Id.*

The fact that recovery of fees is different for plaintiffs and defendants under the statute does not raise Equal Protection concerns. Typically, a law will withstand an equal protection challenge if it bears a rational relationship to a legitimate governmental end. *Bovin v. Black,* 225 F.3d 36, 42 (1st Cir. 2000), citing, *Vacco v. Quill*, 521 U.S. 793, 799 (1997). Bernardo as a party-litigant subject to section 425.16 is not a "suspect class" for purposes of equal protection. Nor does this fee-shifting statute impermissibly burden the fundamental right of access to the courts. *Equilon*, *supra*, 29 Cal.4th at 64; and *see*, *Alyeska Pipeline Co., supra,* 421 U.S. at 262. Federal statutes which cap prisoner-litigants' attorneys' fees in civil rights cases have similarly been upheld. *Bovin*, *supra,* at 42. The *Bovin* court noted that prisoners are not a suspect class for purposes of Equal Protection and determined that the fee cap on a prisoner's recovery of attorneys' fees was rationally related to the legitimate government interests of discouraging frivolous suits, protecting the public fisc, and bringing prisoner incentives to litigate more in line with non-prisoner incentives. *Id.* (*See also*, *Riley v. Kurtz,* 361

F.3d 906, 917 (6th Cir. 2002), finding that capping prisoner's recovery of fees is rationally related to reducing the number of frivolous suits.) Similarly here, section 425.16 is designed to discourage unsubstantiated lawsuits that arise out of a defendant's exercise of First Amendment rights of free speech and petition. This purpose provides a rational basis for the disparity of treatment between the parties.

Moreover, this Court has already approved the use of differing standards for recovery of attorneys' fees in the context of Title VII cases depending on whether the prevailing party is a plaintiff or defendant. *Christiansburg*, *supra*, 434 U.S. at 421, 98 S.Ct. at 700. Under § 706(k) of Title VII, a prevailing plaintiff will ordinarily be awarded attorneys' fees barring special circumstances justifying an exception. In *Christiansburg*, this Court held that prevailing defendants however, would only be entitled to fees where it can be shown that plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith. *Id.* Differing standards were found to be justified where the "equitable considerations" bear differently depending on which party prevails. *Id.* 434 U.S. at 419, 98 S.Ct. at 699. Similar to the Title VII provision at issue in *Christiansburg*, the attorneys' fees provision of section 425.16(c), provides for mandatory fees to a prevailing defendant, but only allows fees for a prevailing plaintiff where it is shown that the defendant's anti-SLAPP motion was frivolous or brought for purposes of delay. (CCP § 425.16(c).) In this way it shifts to plaintiff the costs defendant incurred having to extricate himself from a meritless lawsuit adversely affecting his right to engage in First Amendment activity. This serves the Legislature's declared purpose in enacting the statute to "encourage continued participation in matters of public significance" and to deter lawsuits which

encroach on a person's "right of petition or free speech in connection with a public issue." This concern is "wholly absent" in the case of a plaintiff who successfully opposes an anti-SLAPP motion. Thus, under *Christiansburg*, there is no Equal Protection concern.

## III. CONCLUSION

There are no compelling reasons which would justify review of this matter. Bernardo simply disagrees with the manner in which the state courts interpreted and applied her evidence to the substantive law in the case. Because her claims arose out of Planned Parenthood's protected First Amendment activity and she was unable to state and substantiate a legally sufficient claim, she was subject to the fee-shifting provisions of California *Code of Civil Procedure* section 425.16(c). The statute has been upheld as constitutional by the California Supreme Court. *Equilon, supra*, 29 Cal.4th at 64. Moreover, there is a plethora of analogous federal fee-shifting statutes which have similarly passed constitutional muster.

Respondent Planned Parenthood respectfully requests that this Court deny Bernardo's Petition for Review.

Respectfully submitted,

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